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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 582.

ARTHUR WALTER SEED COMPANY,
a Corporation,
Petitioner,

vs.

KENNETH R. McCLURE, County Treasurer of
Knox County, Indiana,
Respondent.

BRIEF FOR RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

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OPINION BELOW.

The opinion of the Supreme Court of Indiana (R. 28-41), printed in the appendix of petitioner's petition and being at pages VI-XVI, and reported unofficially in 141 N. E. 2nd 847, is correct.

JURISDICTION.

The jurisdiction as stated on page 2 of petitioner's petition and brief is correct, except that no substantial federal question is involved or presented, as claimed by the petitioner.

The decision of the Supreme Court of Indiana is based on the lack of sufficient allegations in petitioner's complaint, which by themselves would be sufficient to invoke the commerce clause of the Constitution of the United States. The facts alleged in petitioner's complaint, passed on by the Supreme Court of Indiana, show clearly that the seed corn in question was not in transit in interstate commerce at the time complained of in its complaint, and, therefore, no federal question is involved.

QUESTIONS PRESENTED.

The questions presented, as stated in petitioner's brief on pages 2 and 3 thereof, are not correctly or fairly stated. The questions presented, in the opinion of the respondent, fairly and correctly stated, are as follows:

1. Do the facts alleged in petitioner's complaint (Petitioner's brief, appendix I-V) clearly show that the goods in question were in transit in interstate commerce on March 1, 1951 and 1952, thereby entitling the petitioner to the protection of the interstate commerce clause of the Constitution of the United States, or the due process clause of the Fourteenth Amendment to the United States Constitution?

2. When goods are shipped by a seller from its office in the State of Illinois to itself at its own warehouse in the State of Indiana, and the goods are held there for an indefinite period of time, sixty days or more, not by necessity or lack of further transportation facilities, or for reasons beyond its control, but for the convenience of the seller, have the goods coming to rest under such circumstances, become subject to local property taxes in the State of Indiana?

3. Can goods shipped by the petitioner herein, from the State of Illinois to its own warehouse in the State of

Indiana, retain their interstate character and continue in transit in interstate commerce, when the goods were retained by the petitioner in its warehouse in Indiana, not due to the necessity of the journey or for the purpose of safety and convenience in the course of movement thereof, but for convenience only in making the goods available for delivery in orderly fashion at an indefinite time and at an indefinite place, sometime in the future; said goods being held in petitioner's warehouse during said period, only because of the possibility that sometime in the future, unfavorable weather conditions might prevent delivery in accordance with the petitioner's Illinois contract?

4. Whether findings of fact made by a state court are binding upon this court, when such findings are supported by the record and inferences drawn therefrom?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3) is not involved because the petitioner's complaint does not state facts sufficient to invoke same.

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States is not involved because the petitioner's complaint does not state facts sufficient to invoke same.

3. Title 64 of the Indiana Statutes sets forth the personal property tax imposed by that state (Burns' Ind. Stat. Anno. 1951, Replacement Vol. 11, part 2, section 64-101FF).

STATEMENT OF THE CASE.

The statement of the case as set forth in petitioner's petition and brief is substantially correct. However, we would like to point out certain pertinent matters pertaining thereto; on page 4 thereof, designated as Paragraph 12 of the complaint (R. 8, App. IV). The statement is a mere conclusion of the petitioner and is not substantiated by the specific facts alleged in its complaint, and therefore it does not present to the lower court the federal question sought to be reviewed.

On page 4 of petitioner's petition and brief, it is stated that the Supreme Court of Indiana assumed that the federal questions sought to be reviewed were properly raised. The record and the opinion of the Supreme Court does not show that it assumed anything. The Supreme Court of Indiana did not dispose of a federal question because petitioner's complaint did not state facts sufficient to invoke the federal questions sought to be raised by the petitioner. The complaint only shows and alleges therein that the corn in question was held in petitioner's warehouse in Indiana because it was necessary to permit an orderly distribution of the petitioner's products in interstate commerce, otherwise unfavorable weather conditions in the spring of the year might prevent petitioner from delivering said corn in accordance with said Illinois Contract (Petitioner's Petition, Appendix III, paragraph 8 of complaint).

REASON FOR REFUSING THE WRIT.

1. The Supreme Court of Indiana has not decided a federal question of substance in a way not in accord with the applicable decisions of this court.

The decisions of this court and other courts are completely in harmony and accord when the particular facts

of this case are considered, and the uniform law is applied thereto. In order to aid the court in applying the law to the particular facts involved, we set forth herein the important and controlling points involved in this litigation as they are stated and set forth in the petitioner's complaint, which is set out in detail in the appendix of petitioner's petition and brief, being I-V thereof.

1. Petitioner, a foreign corporation, is qualified to do business in the State of Indiana.

2. Petitioner's business is that of selling and distributing seed corn.

3. Petitioner has localized its business activities in Knox County, Indiana, to the extent of maintaining and operating a warehouse therein.

4. The seed corn, the assessment of which is in litigation, was shipped by the petitioner from Illinois to itself at its Knox County, Indiana, warehouse sometime prior to March 1st of each of the tax years involved.

5. On March 1st of each year of the tax years involved, the seed corn was owned by petitioner, located in Knox County, Indiana, and in storage in petitioner's warehouse in Indiana.

6. Such shipment and storage of said seed corn, prior to March 1st, was for the sole purpose of making same available for delivery in an orderly fashion at spring planting time, to fulfill orders from Indiana and Illinois, previously received and accepted by petitioner at its office in Grand Ridge, Illinois.

7. Such orders provided for delivery of the seed corn at such places and at such times as the purchasers might designate at spring planting time, which is subsequent to March 1st of each of the tax years involved (presumably around March 15th of each year; that being generally accepted as spring planting time in the area involved).

8. The only purpose other than previously stated for shipping the corn prior to March 1st of each year involved was because otherwise unfavorable weather conditions in the spring of the year **might** prevent the petitioner from delivering said corn in accordance with its Illinois Contract.

9. Under the aforesaid orders, delivery of the seed corn to Petitioner's Knox County, Indiana, warehouse, did not constitute delivery of the same to the purchasers.

Considering the facts as alleged by the petitioner as set forth above, it appears that the petitioner is both technically qualified to do business in Indiana, and is actually transacting local business in Indiana, by means of its warehouse in Knox County, Indiana. It has thus sought, obtained, and is enjoying all the advantages of an Indiana seed company, through its Indiana warehouse outlet. Its activities, effected through the use of said Indiana warehouse, are not substantially distinguishable from those of competing Indiana seed companies. It must be noted that the seed corn was shipped from petitioner's office in Grand Ridge, Illinois, which is just a little over 100 miles from its warehouse in Knox County, Indiana, and presumably approximately the same distance from the alleged purchasers in southern Indiana and Illinois.

Unless shipment to the petitioner's warehouse was beneficial to petitioner's business in Indiana, there would be no reason to ship same to its warehouse, but same could be shipped directly to the purchasers.

Petitioner's seed corn was consigned to itself at its Indiana warehouse—not to the ultimate purchasers. The intended reshipment from petitioner's Indiana warehouse to the purchasers did not constitute a continuation of previous interstate movement. The seed corn had reached its first intended destination when it arrived at petitioner's warehouse in Indiana. The seed corn was wholly at the

discretion of petitioner, as to its use and disposal. It was stored in its Knox County, Indiana, warehouse, maintained and operated by petitioner—not a carrier or an independent warehouse company. Such storage was admittedly for the purpose of making such seed corn available for future delivery in an orderly fashion at an undetermined date at spring planting time to fulfill previous orders, because unfavorable weather conditions might sometime in the future prevent delivery in accordance with the contracts.

Here the storage occurred, not for the carriers' transit reasons, due to necessities of the journey or for the purpose of safety and convenience in the course of the movement. Instead, the storage was for reasons primarily concerned with petitioner's business interests in and about Knox County, Indiana. Consequently, such seed corn owned by the petitioner, and in storage in its Indiana warehouse on the date of assessment, had come to rest and was subject to the taxing power of Indiana.

The following decisions of this court and courts inferior to this court clearly hold that the seed corn in question was not in transit in interstate commerce as claimed by the petitioner, but on the contrary said decisions clearly hold that the seed corn if it had an interstate character, lost same when it reached petitioner's warehouse and was retained there as set forth herein, only for the convenience of the petitioner and or purchasers, and on the mere possibility that unfavorable weather conditions might possibly sometime in the future prevent orderly distribution.

The following law and cases applicable to the case now before the court are clearly in harmony and sustained respondent's contention:

A recent decision of the United States Supreme Court, whose principles and logic are deemed applicable to the within fact pattern, is the case of Norton Co. v. Department

of Revenue of Illinois (1951), 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517.

Referring to the activities of the Chicago business situs, the United States Supreme Court stated at page 536 of 340 U. S. as follows:

> "The Chicago office thus intervenes between vendor and Illinois vendees and performs service helpful to petitioner's competition for that trade in all Illinois sales except when the buyer order **directly** from Worcester, and the goods are shipped from there **directly** to the buyer." (Emphasis supplied.)

The law as applied to the facts in the **Norton case**, supra, as stated by the United States Supreme Court at pages 537, 538 and 539 of 340 U. S., is as follows:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.
>
> "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth case. But, from a competitive point of view, that system has disadvantages. The trade may view the seller as remote and inaccessible. He cannot be reached with process of local courts for breach of contract, or for service if the goods are defective or in need of replacement. Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders

for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, Cooney v. Mountain States Telegraph Co., 294 U. S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

Should anyone doubt the applicability of the above Norton decision to the instant case because the tax there involved was not a property tax, we especially invite attention to the fact that the tax in the Norton case was the Illinois Occupation Tax imposed "upon persons engaged in the business of selling tangible personal property at retail in this State", computed upon gross receipts—a type of tax far more vulnerable under the Commerce Clause than is a property tax. (See 340 U. S. 535.)

The facts in our case certainly indicates a desire to sell and deliver under circumstances competing with and comparable to local seed companies. A most valuable competitive advantage of the local seller and supplier is usually his ability to make immediate or speedy delivery according to the dictates of the purchaser. Unquestionably petitioner's Knox County, Indiana, warehouse facility provides this most valuable advantage, placing it upon equal terms with local concerns as respects delivery.

Another decision in point is General Oil Co. v. Crain (1908), 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754. There a corporation domestic in Tennessee and engaged in the sale and distribution of coal oil to various States of the Union from its Tennessee point of distribution objected to the imposition of an inspection fee by Tennessee upon oil intended to be delivered outside of Tennessee to fill orders already received. Such oil had been shipped from its wells and refining plants in Pennsylvania and Ohio to itself to

its distribution facilities in Memphis, Tennessee. The United States Supreme Court held as follows at pp. 230 and 231 of 209 U. S.:

"Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the States. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State & C. v. Engle, supra, but for the business purpose and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v. Speed, 192 U. S. 500."

This case serves as authority in upholding the instant tax upon all seed corn stored in the Knox County, Indiana, warehouse irrespective of whether it was intended for delivery to Indiana or Illinois purchasers, as alleged in the complaint.

In this case, the shipment from the petitioner to its purchasers was actually a shipment from petitioner's Knox County, Indiana, warehouse to said purchasers—and in the case of Indiana purchasers was not an interstate shipment. Clearly this was not the case of a continuing interstate movement from Grand Ridge, Illinois, to the purchasers, as is demonstrated by the following authorities:

Chicago, Milwaukee and St. Paul Railway Company v. State of Iowa (1914), 233 U. S. 334, 343, 34 S. Ct. 592, 58 L. Ed. 988;

Baltimore and Ohio Southwestern Railroad Company v. Settle et al. (1922), 260 U. S. 166, 173, 43 S. Ct. 28, 67 L. Ed. 189;

Atlantic Coast Line Railroad Company v. Standard Oil Company of Kentucky (1927), 275 U. S. 257, 48 S. Ct. 107, 72 L. Ed. 270;

Brosious v. Pepsi-Cola Co. et al. (1946), 155 F. (2d) 99, 103;

Gross Income Tax Division v. J. L. Cox & Son (1949), 277 Ind. 468, 479, 86 N. E. (2nd) 693.

All the above decisions generally establish the proposition that interstate commerce ceases at the point of its destination and when the property has been delivered to the designated consignee; further, that when property has been transported from one state into another, the interstate movement ends with the delivery of that property to the consignee's distribution center and that deliveries from such point to customers in the same state constitute intrastate commerce.

In this case a greater degree of control as to the use and disposal of its property on the date of assessment in each

tax year is not conceivable. Clearly the petitioner had the power to divert said seed corn from what may have once been its intended use to other purposes, such as for fulfilling orders received and accepted subsequent to the arrival of said property in Knox County, Indiana.

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."
>
> Minnesota v. Blasius (1933), 290 U. S. 1, at p. 10, 54 S. Ct. 34, 78 L. Ed. 131.

Where the cessation of movement takes place not simply for the carrier's transit reasons relating to the necessities or convenience of the journey, but for reasons primarily concerned with the owner's business interests (as we contend here), the goods have come to rest and are subject to the taxing power of the State.

> Independent Warehouses, Inc., et al. v. Scheele (1947), 331 U. S. 70, 82, 83, 84, 67 S. Ct. 1062, 91 L. Ed. 1346.

There is no allegation in the complaint which asserts that the stoppage in transit was necessary for the benefit of either the carrier or purchaser to provide due necessities of the journey or for the purpose of safety and convenience in the course of the movement. Admittedly, petitioner's practice was for its business advantage to provide for an orderly distribution.

Another case with facts involved almost identically to the case now before the court, uses the following language:

> "Property actually in transit from state to state, is exempt from state taxation, but if it be stored for an

indefinite time during such transit, as least for other than natural causes, or lack of transportation, it may be lawfully assessed by state authorities."

St. v. Maxwell Motor Sales Corporation (1919), 171 N. W. 566 (Supreme Court of Minn.).

There appear to be no distinguishing facts at all between this case and the case now before the Court.

Many other cases supporting the contentions of the respondent, that the seed corn referred to was not in transit in interstate commerce in the years designated are as follows:

Atlantic Coast Line R. Co. v. Standard Oil Co. of New Jersey (1926), 12 Fed. 2nd 541;

Gulf Ref. Co. v. Phillips (1926, C. C. A. 5th), 11 Fed. 2nd 967 (Writ of Certiorari denied in 1926), 273 U. S. 697, 71 L. Ed. 845, 47 S. Ct. 93;

Susquehanna Coal Co. v. South Amby, 228 U. S. 665, 57 L. Ed. 1015, 33 S. Ct. Rep. 712;

Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. Rep. 299.

The petitioner lays great stress on its conclusion alleged in its complaint that the goods were in transit in interstate commerce at the time complained of, contending that same is admitted by respondent's demurrer in the lower court. This contention is adequately answered in the opinion of the Indiana Supreme Court quoted in petitioner's petition and brief in the appendix thereof, VI-XVI, wherein it is stated that specific averments in a pleading must be given precedence over general averments regarding the same matter; in other words, specific averments control, not the conclusion alleged.

The Supreme Court of Indiana had full right to take judicial knowledge of spring planting time in the com-

munity involved, and had full right to draw any and all reasonable inferences from the facts as alleged in the petitioner's complaint. All inferences drawn by the Supreme Court of Indiana in this litigation were reasonable and fair inferences, as will be noted by this court and the petitioner is not entitled to complain of same in this proceeding.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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